BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHELLE LYNN DODDS	)	
Claimant	)	
	)	
VS.	)	
	)	
WENDY'S	)	
Respondent	)	Docket No. 1,019,268
	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the November 23, 2004 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The ALJ denied claimant's request for medical treatment and the payment of outstanding medical bills. In his preliminary hearing Order the ALJ summarized the evidence and concluded that the evidence failed to persuade him that claimant had filed a timely written claim as required by K.S.A. 44-520a.

Claimant alleges the ALJ erred in relying on the rational set forth in *Fitzwater.*[1] Claimant maintains that, unlike the employee in *Fitzwater*, she testified that her precise intent when presenting her doctor's release to her managers was to assert a claim for compensation. The fact that they refused to accept that documentation should not, according to claimant, defeat her claim for compensation.

[1] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

Respondent urges the Board to affirm the ALJ's preliminary hearing Order in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges two separate injuries occurred on March 10, 2003 and again on April 19, 2003. In both instances she says her falls were witnessed and that she notified her supervisor, Heather Rauch and/or David Stahlin. She further testified that following each accident she attempted to give her supervisors a document from her primary care physician indicating that she was suffering from low back pain and that she was only to work if she felt capable of doing so. Claimant adds that this document also contained language to the effect that if claimant was unable to do the work, she would need to file a claim or pursue legal action.[2]

Claimant is unable to provide the document she describes. She testified that she tried to give this document to Heather Bauch, but Ms. Bauch refused it. Claimant kept the document for a year and figured she no longer needed it.

Claimant continued working for respondent after her accidents, and admits missing work, sometimes for pain in her back, and at other times because her children were sick. Then, in August 2003, she was apparently disciplined by David Stahlin for missing work. Rather than being fired claimant walked out on Mr. Stahlin.

Thereafter, on August 4, 2003, claimant contacted Lorelei Scott, an individual higher up in respondent's company. According to Ms. Scott, their conversation centered around claimant's request that she be reinstated in her job. There was no mention of any work-related injuries during this conversation. In spite of this call, claimant was apparently terminated. She never returned to her job at respondent's restaurant.

Nearly a year later, on July 30, 2004, claimant again contacted Ms. Scott. During this call she indicated that she had fallen in March and April 2003 while working for respondent and needed medical treatment. This was the first indication that Ms. Scott had of any work-related injury. She investigated claimant's claim and was unable to confirm the accidents. Nonetheless, she sent out an accident form to claimant. Claimant executed a written claim for compensation on September 17, 2004. Thereafter, claimant filed her Application for Hearing with the Division of Workers Compensation on September 22, 2004. Respondent filed an accident report with the Division on October 26, 2004.

The ALJ concluded that even though claimant testified that she intended on making a claim for workers compensation benefits when she presented her physician's statement

[2] P.H. Trans. at 25.

to her supervisors, he viewed that testimony with skepticism.[3] He noted that in her conversation with Ms. Scott in August 2003, *after* her injuries and *after* she walked out on her supervisor thus endangering her employment, claimant made no mention of her work-related injuries or her need for treatment. It was over a year later that claimant expressly asserted a claim. The ALJ viewed this conduct as inconsistent with her contention that she intended on asserting a claim immediately after each of her injuries. The Board agrees.

The written claim statute, K.S.A. 44-520a, provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[4] The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.[5] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*,[6] the Kansas Supreme Court described the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

The ALJ analogized the facts in this claim to the one involved in *Fitzwater*. He reasoned that, just like in *Fitzwater*, the document described by claimant and produced at the preliminary hearing "made no demand for treatment and strikes the court as more of an advisory opinion regarding claimant's level of activity and future course of action than

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[3] ALJ Order (Nov. 24, 2004) at 1.

[4] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[5] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[6] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

a written claim for compensation."[7] Based upon the evidence contained within the record, as presently developed, the Board agrees with the ALJ's analysis and affirms the preliminary hearing Order in all respects.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad Avery dated November 23, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2005.

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BOARD MEMBER

c: Roger Fincher, Attorney for Claimant
John Emerson, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] ALJ Order (Nov. 24, 2004) at 1.